

Client Alert

Data, Privacy & Security Practice Group

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LinkedIn Blocked in Russia: Privacy and Trade Law Aspects

The business networking platform LinkedIn is the first major international player to fall victim to the implementation of Russia's "data localization" law, with effect from September 1, 2015, which requires all parties processing personal data of Russian citizens to have this data stored in the territory of the Russian Federation. A failure to comply, including in case of parties having no Russian presence, may result in the blocking of access to the respective web resources by Russian users at the internet-providers' level in Russia (a tool already broadly used by the Russian authorities).

On November 10, 2016, the Moscow City Court upheld in the appellate instance the court order of August 10 satisfying the claim by the competent federal authority to block access to "LinkedIn" websites in the territory of the Russian Federation. With the appellate ruling having immediate effect, on November 17 local Internet providers started blocking access to LinkedIn's services in Russia. The regulator in charge of personal data matters, Roskomnadzor, claims that LinkedIn refused to localize data despite repeated orders to do so, while the network in its statement distributed to Russian users on November 18 says they believe they are in compliance with all applicable laws.

Meanwhile, based on Russia's obligations under the rules of the World Trade Organization (WTO), the decision to block access to the "LinkedIn" business networking site appears to violate international treaty commitments assumed by Russia under the General Agreement on Trade in Services (GATS).

The terms of Russia's accession to WTO are specified in its Protocol of Accession signed on December 16, 2011. The Schedule of Specific Commitments on Services resulting from the negotiations between the Russian Federation and WTO Members is annexed to the Protocol of Accession. Russia's Schedule of Specific Commitments contains no limitations on market access for digital, IT or data storage, processing and transmission services relevant to business networking internet sites. The only limitation specified for cross-border supply of services is set for radio communication services, which is not relevant to LinkedIn's case. Thus, Russia has committed under WTO/GATS rules to allow the cross-border supply of information distribution and data base access services.

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Under GATS rules, where market access commitments are made to allow the supply of the services across borders, WTO Members may not require that the same services (e.g., data storage, processing and access) be duplicated within their territory. Such “localization” requirements also necessarily modify the conditions of competition in favor of competing Russian companies because local companies only bear the cost of data storage in Russia, whereas foreign companies’ costs for data storage are at least doubled by such requirements.

Effectively, Russia has introduced data localization requirements that appear to violate existing GATS rules and commitments to allow cross-border data flow without local storage.

In the absence of reservations upon accession or any applicable exceptions in Russia’s Protocol of Accession or in the Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, the only exceptions that Russia may invoke to justify the localization requirement are under Article XIV “General Exceptions” and Article XIV bis “Security Exceptions” of the GATS. GATS Article XIV does indeed provide an exception under which WTO Members can justify violations of WTO rules for measures that are “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATS]” and relate to “the protection of the privacy of individuals in relation to the processing and dissemination of personal data...”. However, questions may be raised about whether these conditions are satisfied in the current case. The data localization legislation has, indeed, been introduced and promoted in Russia as a measure to protect citizens’ data from unlawful access, processing and distribution, invoking both people’s privacy interests and national security purposes. However, the actual measure does not achieve this stated goal because the obligation to store data in Russia does not prohibit transferring or storing the same data outside of the country. In any case, it has not been established that the storage personal data within Russia is any more secure than outside Russia. Moreover, in the present case, Russian citizens’ data remains accessible internationally, despite Russia’s local blocking sanctions. The legislation does not even allow the citizen to decide if he or she wants to allow cross-border access to his/her data, as express consent is not viewed as an exemption from the local storage obligation.

Considering the above, it would appear difficult to invoke a General Exception under the GATS to justify the Russian law. However, less international scrutiny is applied under WTO rules to Security Exceptions. Although it might be difficult to explain why saving Russian citizens’ personal information within Russia is in the country’s “essential security interests”, the question may well be whether a WTO Member government takes up the case.

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